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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE POLK,

Defendant and Appellant.

B291477

(Los Angeles County  
Super. Ct. No. BA450316)

APPEAL from an order of the Superior Court of Los Angeles County. Richard S. Kemalyan, Judge. Affirmed.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Respondent.

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## INTRODUCTION

Appellant Joe Polk appeals the trial court's denial of his request to strike Penal Code section 12022.53<sup>1</sup> firearm enhancements after remand for resentencing pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620). The trial court denied the request, concluding that the original sentence was appropriate. Appellant's appointed counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436, requesting that this court conduct an independent review of the record. Having done so, we affirm the trial court's order denying appellant's request.

## FACTUAL AND PROCEDURAL HISTORY

In September 2016, appellant fired multiple shots at Warren Kelly, hitting him in the left arm and right leg. Following trial by jury, appellant was convicted on a single count of attempted murder and sentenced to 25 years to life pursuant to the "Three Strikes" law (§§ 664/187, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(e)), plus 25 years to life for personally and intentionally discharging a firearm causing great bodily injury (§ 12022.53, subd. (d)), plus 10 years for two prior felony convictions (§ 667, subd. (a)(1)). The trial court also imposed and stayed a 20-year term and a 10-year term for additional firearm enhancements (§ 12022.53, subds. (c) & (b)). On appeal, we remanded the matter for the trial court to exercise its newly-granted discretion under SB 620 whether to strike the firearm enhancements.

On July 20, 2018, the matter came before the trial court for resentencing. Having reviewed the trial notes, probation report, sentencing transcript, and sentencing memoranda filed before

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<sup>1</sup> All further statutory citations are to the Penal Code.

and after the remand, the court declined to strike the firearm enhancements and re-imposed the previous sentence.<sup>2</sup> The court noted appellant's criminal history, including two prior convictions of "serious and violent felonies."<sup>3</sup> The court also noted the "cavalier and unnecessary" use of a handgun in the present offense, where there was "no evidence of the victim being armed and . . . the victim was outnumbered, blindsighted with a punch from one of the individuals in the [appellant's] group and shot twice by the [appellant]." As an aggravating circumstance related to the crime, the court found that the crime "involved great violence and great bodily injury disclosing a high degree of cruelty and callousness. Further, the [appellant] was armed with and used a firearm at the time of the crime and the victim was particularly vulnerable to the extent that he was outnumbered and unarmed." As an aggravating circumstance related to appellant, the court found that he "has engaged in violent conduct that indicates a serious danger to society, that his prior convictions as an adult appear to be increasing in seriousness

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<sup>2</sup> The sentencing memoranda filed postremand by defense counsel argued that, in the event the court imposed a firearm enhancement, it should impose a "lesser-included enhancement" of three, four or ten years under section 12022.5.

<sup>3</sup> Appellant was convicted of forcible rape in 1993 and 1995. Following his 1995 conviction, appellant was sentenced to 38 years in state prison and released on parole in 2014. At the sentencing hearing for the present offense, the trial court denied appellant's *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 motion to strike the prior convictions, finding that appellant had not led a "crime-free life" since the prior convictions, having committed attempted murder less than one and a half years after being released from custody.

and that [appellant] may have been . . . on parole at [the] time.” The court found no mitigating circumstances.

Appellant timely appealed. After reviewing the record, appellant’s court-appointed counsel filed an opening brief requesting this court independently review the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436. On September 18, 2018, we sent a letter to appellant’s last known address, advising him that he had 30 days within which to submit by brief or letter any contentions or argument he wished this court to consider. Appellant did not submit any brief or letter.

### DISCUSSION

We review the trial court’s sentencing decision for abuse of discretion and generally presume the court exercised its broad discretion properly. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977, 978 [discretionary authority is “contextual” and requires “individualized consideration of the offense, the offender, and the public interest”].) In the absence of a clear showing that the sentence is arbitrary or irrational, the trial court’s sentencing discretion will not be disturbed on appeal. (*People v. Ogg* (2013) 219 Cal.App.4th 173, 185.) Pursuant to SB 620, section 12022.53 was amended to permit the trial court to strike or dismiss a firearm enhancement under that section: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§ 12022.53, subd. (h).)

Because our independent review of the record under *People v. Wende* discloses no arguable issue, we affirm the judgment.

On remand, the trial court complied with our directions. It held a resentencing hearing, and exercised its new discretion pursuant to SB 620. After considering appellant's criminal history and the nature of his present offense, the court conclusively expressed its judgment that the original sentence was appropriate for appellant's crime. Thus, the trial court properly denied appellant's request to strike the firearm enhancements.

Appellant has, by virtue of counsel's compliance with the *People v. Wende* procedure and our review of the record, received adequate and effective appellate review of the order denying his petition. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-279.)

#### **DISPOSITION**

The order denying appellant's request to strike section 12022.53 enhancements is affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.